



Legal Update

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The SJC holds that police had reasonable suspicion to believe that the defendant was concealing contraband in his crotch, but they lacked probable cause to conduct a strip search of the defendant!

Commonwealth v. Donne K. Agogo, SJC No. 12592 (2019): Chelsea police were conducting surveillance near Bellingham Square. While police focused their attention on a multifamily apartment building, they noticed the defendant, Donne Agogo, repeatedly try to initiate conversations with pedestrians. The defendant entered the apartment building, remained inside for approximately thirty seconds, and then returned to the sidewalk in front of the building. After watching the defendant, the police became increasingly suspicious of his behavior. The police saw an individual, later identified as James Foster, approach the defendant, who was again standing outside the apartment building. Foster was "manipulating something in his hands" as he spoke to the defendant; the police believed that Foster was counting currency. Foster and the defendant then turned and walked around the corner, where they were no longer in view of the officers. Because police believed a drug transaction was about to take place, they, too, rounded the corner. At some point, the police saw currency exchanged and believed a drug transaction had occurred.

Police told Foster to remove his hands from his sweatshirt pockets and they conducted a pat-frisk of him. Police found on Foster's person a knife and a knotted bag that contained

cocaine. The police approached the defendant, who appeared to be upset and animated, and he was not complying with the police. The defendant took a "bladed" stance and began pulling away from one of the officers, when police told him they were going to conduct a pat-frisk. The police found a twenty-dollar bill on the defendant. Both Foster and the defendant were arrested and brought to the station for booking.

Based on their training and experience, the police believed that the defendant was concealing drugs. When police told the defendant they were going to perform a strip search, he protested. The police escorted the defendant to another room and ordered him to remove his shoes and socks as well as his shirt, pants, and underwear. When the defendant was fully undressed, the police saw a red bandana and seized it from his groin area. The bandana contained what they believed to be seven small bags of cocaine.

The defendant filed a motion to suppress the drugs. He argued that (1) police lacked probable cause to conduct a strip search and (2) the strip search was not properly conducted because it deviated from departmental policy. The motion judge found that police did not have probable cause to conduct a strip search of the defendant, and allowed the motion to suppress. The Commonwealth appealed. A divided panel of the Appeals Court reversed the order allowing the motion to suppress and the SJC allowed the defendant's petition for further appellate review.

Issue: Did the police have probable cause to conduct a strip search of the defendant?

There is no dispute that the police had probable cause to arrest the defendant on drug charges and to conduct a search incident to the arrest. However, in this case, police determined that a strip search was necessary. **Probable cause to conduct a strip search requires some affirmative indication that drugs or other contraband are being concealed in areas such as the crotch or groin.** “The requisite affirmative indication that contraband or weapons are being secreted in very private parts of the body may take a number of forms, as our cases have recognized.” Potentially, the sight or feel of an unusual object or protrusion that supports police suspicion of drug involvement. See, e.g., *Commonwealth v. Clermy*, 421 Mass. 325, 330-331 (1995) (police suspicion supplemented when, during patfrisk, they felt hard plastic prescription drug container hidden in defendant's groin); *Commonwealth v. Vick*, 90 Mass. App. Ct. 622, 624-625, 630-631 (2016) (probable cause to conduct strip search where, during patfrisk, officer felt hard object in cleft of defendant's buttocks). “When a hard object or suspicious bulge is detected, it is more likely to amount to probable cause if the confluence of factors otherwise known to police at the time of the strip search confirms their belief that the object is a weapon or contraband.” And even if the touching does not alone supply

probable cause, it may contribute together with other facts to a probable cause finding. The defendant's behaviors may suggest he is hiding something somewhere on his person that a patfrisk reasonably could not discover without removing the defendant's clothing. For example, if a an arrestee is seen attempting to block his or her groin, buttocks, breasts or genital area from police view or reach, during an ordinary search or patfrisk, these actions may indicate the arrestee is trying to hide something. See *Commonwealth v. Prophete*, 443 Mass. 548, 554-555 (2005) (police suspicion supplemented when defendant twice used hands to protect groin area during patfrisk).

The SJC examined all the facts in this case that police believed gave them probable cause to conduct a strip search. The defendant had been engaging in street-level drug distribution at the time he was arrested and police suspected that may be concealing drugs in the crotch area to avoid detection. When the police approached the defendant, he took a "bladed" stance, and displayed an animated demeanor. The defendant also pulled away from police prior to their decision to pat frisk him. Police discovered twenty dollars on the defendant's person when they conducted a patfrisk. Twenty dollars is an amount consistent with the street value of the suspected cocaine they found on Foster's person. Later, at the police station, when police informed the defendant of his imminent strip search, he vocally protested. All these factors provided police only with reasonable suspicion that the defendant could be concealing contraband in his crotch. However, when evaluating whether a strip search is constitutionally permissible, reasonable suspicion is not enough. See *Prophete*, *supra* at 553 (reasonable suspicion to initiate a strip search is sufficient under the Fourth Amendment, but probable cause is required under art. 14).

In the underlying case, there was no affirmative indication that the defendant was hiding contraband or weapons in his groin area. The defendant did not attempt, at any point, to block officers from reaching or viewing his groin area. Furthermore, there was no evidence that the defendant placed anything in his crotch, reach for his crotch, or walk in a manner consistent with there being an object concealed in his crotch. "The officer's training and experience as to the general practices of street-level drug dealers without more do not constitute the requisite particularized indication of concealment."

Commonwealth v. Amado, 474 Mass. 147, 155 (2016). Likewise, the defendant's behavior justifying the patfrisk at the scene (taking a bladed stance) was too attenuated in relation to the later strip search that occurred at the police station. Lastly, the defendant's animated vocal displeasure at the prospect of being subjected to a strip search is not the type of behavior the courts have recognized as affirmatively indicative of concealment. "Were it otherwise, the risk is that such a reaction to being told of an imminent strip search readily could be induced, and then used to justify the search." The SJC affirmed the order allowing the defendant's motion to suppress.